

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re

CUSTOMS AND TAX ADMINISTRATION OF  
THE KINGDOM OF DENMARK  
(SKATTEFORVALTNINGEN) TAX REFUND  
SCHEME LITIGATION

MASTER DOCKET

18-md-02865-LAK

This document relates to:     The cases identified in  
Appendix A

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**DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
THEIR MOTION FOR ISSUANCE OF A REQUEST FOR INTERNATIONAL  
JUDICIAL ASSISTANCE TO OBTAIN EVIDENCE IN DENMARK**

SKAT objects to the relief Defendants seek—Hague Convention assistance in obtaining the testimony of nine former Danish ministers of taxation—on the ground that the testimony is irrelevant and duplicative. Both arguments are wrong, and Defendants' request should be granted. The ministers who are the subject of this motion each faced a choice: they could take action to limit the use of dividend arbitrage strategies that attracted investors around the world to trade in Danish securities, or they could prioritize foreign investment. Eyes wide open, they chose the latter. And that decision—and the proof that the Danish government knew about the trading strategy that SKAT has now decided is fraudulent—is critical to SKAT's claims and to multiple defenses raised by Defendants.<sup>1</sup>

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<sup>1</sup> SKAT's assertion that Defendants' request comes too late is factually inaccurate, which explains why SKAT does not actually object to the request on that basis. The reality is that SKAT too is still conducting discovery, taking depositions and producing documents. The global pandemic derailed the schedule under which the parties were proceeding, and the parties are currently negotiating a revised timeline for proposal to the Court, which contemplates the close of fact discovery in several months.

First, the testimony of each of the nine former tax ministers is directly relevant to multiple defenses in this litigation, and, more fundamentally, to any understanding of the dividend withholding tax regime in Denmark. The Ministry of Taxation has oversight responsibility for SKAT, received numerous warnings from SKAT about risks related to its payment of dividend withholding tax, and—for years—its leadership made a deliberate choice to promote foreign investment rather than close widely known loopholes that presented arbitrage opportunities to investors around the world. *See* ECF No. 535 Exs. 4-15. Testimony of the tax ministers will establish that at the highest levels of the government of the Kingdom of Denmark, it was known that SKAT’s administration of reclaim applications for the payment of dividend withholding tax was not a highly regulated process. In fact, the tax ministers were told that SKAT was flying blind, and their reaction was to ensure that SKAT stayed the course. These facts bear directly on SKAT’s equitable claims, and on defenses relating to causation, failure to mitigate, contributory or comparative fault, the statute of limitations, and even the revenue rule.

One need only look to proceedings in Denmark to confirm the relevance of the tax ministers to this litigation. In a publicly available report authored by the law firm Bech-Bruun in December 2017 reflecting its “investigation into the circumstances regarding SKAT’s payment of dividend tax refunds,” the authors concluded that the Ministry of Taxation did not have a “sufficiently specific and effective response” to warnings about “the overall risk picture” associated with “dividend tax refunds,” and “violated at least the obligation to conduct enhanced supervision and management of SKAT.” McCarthy Decl., Ex. 3 at 2. More recently, every single one of the nine former tax ministers was called to testify before the Undersøgelses-Kommissionen Om SKAT (translated as the “Danish Commission on Inquiry into Tax”), which does focus, contrary to SKAT’s claims, on dividend withholding tax and reclaim

applications.<sup>2</sup> As the Commission itself announced, “the Commission has requested that the matters concerning SKAT’s payment of dividend tax refund be included in the Commission’s work,” and as a result, “the Commission has interrogated ... the nine Ministers of Taxation.”<sup>3</sup> In seeking answers—including “whether there is a basis for the public authorities to seek someone held accountable”<sup>4</sup>—Denmark interrogated these tax ministers. SKAT ought not be permitted to shield from Defendants the very witnesses that its own state-sponsored Commission believed were necessary in seeking to determine where to allocate blame.

SKAT’s Opposition misses the mark. Defendants have identified relevant information each minister may possess (*see* ECF No. 535, Exs. 4-15), and to the extent SKAT claims the motion is factually deficient, that is only a function of the fact that Defendants have been unable to access copies of the purportedly unsworn testimony of the ministers to the Commission. Each minister served between the period of 2004 through the end of the period of SKAT’s claims, and the testimony will establish how SKAT and the Ministry of Taxation were aware of the inadequate controls around the reclaim process and the decisions to reject repeated proposals to increase control and mitigate risk. While some ministers had shorter tenure than others, the length of their tenure will not necessarily correspond to the knowledge each minister may have about the process. For example, after the Danish parliament in 2009 passed legislation granting the Minister of Taxation the authority to change the reporting deadline to provide SKAT with

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<sup>2</sup> See, e.g., Tillægskommissorium af 9. april 2018 for Undersøgelseskommisionen om SKAT [translated] (Apr. 12, 2018), <https://kommissionenomskat.dk/kommissorium/tillaegskommissorium-af-9-april-2018-for-undersoegelseskommisionen-om-skat.html> (“The Commission of Inquiry must investigate and account for SKAT’s management of the dividend tax area. The study and the statement must include SKAT’s organization and execution of the case processing and case information in connection with the payment of a refund of dividend tax, including the check that the conditions for the payments were met.”).

<sup>3</sup> Orientering nr. 13 - december 2020 [translated] (Dec. 16, 2020), <https://kommissionenomskat.dk/nyheder/orientering-nr-13-december-2020.3532.html> (emphasis added).

<sup>4</sup> The Commission of Inquiry Into SKAT, <https://kommissionenomskat.dk/> (last visited Feb. 24, 2021).

more accurate dividend information,<sup>5</sup> the order, even with its limited additional safeguards, was not signed until late 2012 by Holger K. Nielsen.<sup>6</sup> Between Kristian Jensen, who was minister when Parliament first granted the authority, and Nielsen, who exercised it, there were three additional ministers. Each of Jensen, Troels Lund Poulsen, Peter Christiansen, Thor Möger Pedersen and Nielsen's testimony is relevant and essential to understanding the Danish government's reluctance to impose additional controls on its own financial industry. And the testimony of the tax ministers in place between 2012-2015 is relevant because, among other reasons, they have been deemed by Bech Bruun to have "fail[ed] to initiate a more detailed examination of the possible reasons for the continued increase in dividend tax refunds," and to respond appropriately to warnings about SKAT's administration of the reclaim process. McCarthy Decl., Ex. 3 at 2.

Second, the testimony Defendants seek is not cumulative and cannot be obtained from SKAT. SKAT apparently takes the view that Defendants should be content to depose *three* witnesses and seems confident that all of Defendants' questions will be answered. But SKAT's *ipse dixit* does not make it so; Defendants are plainly entitled to additional testimony, under oath, not only from current and former SKAT employees, but also from the former Ministers of Taxation who oversaw SKAT's work.<sup>7</sup>

The testimony Defendants seek is not cumulative of discovery that Defendants will obtain from SKAT. This motion seeks discovery of individuals who led the Ministry of

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<sup>5</sup> Tr. of Episode 4, *The Secret Shareholders*, DR (Nov. 6, 2020), <https://www.dr.dk/radio/p1/de-hemmelige-aktionaerer>, at 11:00, ECF No. 535-8, McCarthy Decl., Ex. 8.

<sup>6</sup> Tr. of Episode 6, *The Secret Shareholders*, DR (Nov. 6, 2020), <https://www.dr.dk/radio/p1/de-hemmelige-aktionaerer>, at 5:00, ECF No. 535-9, McCarthy Decl., Ex. 9.

<sup>7</sup> Defendants intend to file a second (and final) motion seeking additional depositions from relevant witnesses through the Hague Convention process shortly.

Taxation. SKAT has asserted that that the Ministry of Taxation is a distinct government entity, and that SKAT “has no obligation or duty (and will undertake no such obligation or duty) to search for, collect or produce information or documents that are under the possession, custody, or control of any other agency or instrumentality of the government of the Kingdom of Denmark.” McCarthy Decl., Ex. 2 at ¶ 17. Accordingly, SKAT’s assertion that Defendants’ impending 30(b)(6) deposition of SKAT somehow obviates the need for discovery of the Ministry of Taxation is nonsensical. Defendants may seek relevant testimony from any party, not only the witnesses SKAT chooses to provide.

Moreover, while SKAT claims that it will provide testimony on the same topics encompassed by the testimony of the Ministers of Taxation, the record is markedly different. SKAT’s objections to Defendants’ Rule 30(b)(6) notice seek to severely curtail both the time and scope of the testimony. Opp. at 4, ECF No. 541. For example, Defendants seek information about topics 2-4 concerning SKAT’s policies and procedures for reviewing reclaim applications and for determining ownership of shares and verifying ownership of shares from the period March 1, 2005 to the present (*see* Weinstein Decl., Ex. 1 at 2, ECF No. 542), but SKAT has only agreed to produce a witness to testify about the period between January 1, 2012 and December 31, 2015. McCarthy Decl., Ex. 1 at 6-8. SKAT has lodged the same objections to Topic 7, SKAT’s controls related to the collection and payment of refunds and claims, again narrowing the time period to January 1, 2012 to December 31, 2015. *Id.* at 10. While SKAT has agreed to provide a witness as to Topics 10 and 11, investigations including specific reports and audits and any “early warning” issued by SKAT to the Ministry of Taxation, again it has objected to the time period and scope. *See id.* at 12-13. SKAT has also refused to produce a witness to testify, even to non-privileged communications, regarding communications between SKAT, SOIK (the

Danish Prosecution Office) and the Ministry of Taxation, the subject of another of Defendants' designated topics. *Id.* at 13-14.

Defendants do not seek to litigate responses and objections to their Rule 30(b)(6) notice in this reply brief. However, the responses and objections clearly illustrate that the testimony SKAT is prepared to provide is hardly co-extensive with the scope or the time period of the testimony Defendants seek to obtain from the nine Ministers. It simply is not the case that "the discovery sought by [defendant] could ... [n]ever lead to the discovery of non-cumulative evidence," as in the *Skyline Steel* case upon which SKAT relies. Opp. at 7 (citing *Skyline Steel, L.L.C. v. PilePro, L.L.C.*, No. 13-CV-8171 (JMF), 2015 WL 13832108, at \*2 (S.D.N.Y. Jan. 28, 2015)). In short, the information Defendants seek is specific, relevant, and well within the ambit of Rule 26.

The law is clear: Defendants' burden in this context "is not heavy." *Pearlstein v. BlackBerry Ltd.*, 332 F.R.D. 117, 120 (S.D.N.Y. 2019). The motion should be granted.

Dated: New York, New York  
February 24, 2021

Respectfully submitted,

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Newsong Fellowship Church 401K Plan, Riverside  
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## APPENDIX A

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Elizabeth van Merkensteijn		19-cv-01893
Azalea Pension Plan		19-cv-01893
Basalt Ventures LLC Roth 401(K) Plan		19-cv-01866
Bernina Pension Plan		19-cv-01865
Bernina Pension Plan Trust		19-cv-10713
Michelle Investments Pension Plan		19-cv-01906
Omineca Pension Plan		19-cv-01894
Omineca Trust		19-cv-01794 19-cv-01798 19-cv-01788 19-cv-01918 19-cv-01928

Defendants	Counsel	Associated Case(s)
Remece Investments LLC Pension Plan		19-cv-01931 19-cv-01800 19-cv-01803 19-cv-01809 19-cv-01818 19-cv-01801 19-cv-01810 19-cv-01813  19-cv-01911
Starfish Capital Management LLC Roth 401(K) Plan		19-cv-01871
Tarvos Pension Plan		19-cv-01930
Voojo Productions LLC Roth 401(K) Plan		19-cv-01873
Xiphias LLC Pension Plan		19-cv-01924
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Jocelyn Markowitz		19-cv-01904
Avanix Management LLC Roth 401(K) Plan		19-cv-01867

Defendants	Counsel	Associated Case(s)
Batavia Capital Pension Plan Calypso Investments Pension Plan  Cavus Systems LLC Roth 401(K) Plan  Hadron Industries LLC Roth 401(K) Plan  RJM Capital Pension Plan  RJM Capital Pension Plan Trust  Routt Capital Pension Plan  Routt Capital Trust		19-cv-01895 19-cv-01904  19-cv-01869  19-cv-01868  19-cv-01898  19-cv-10713  19-cv-01896  19-cv-01783 19-cv-01922 19-cv-01926 19-cv-01929 19-cv-01812 19-cv-01870 19-cv-01792 19-cv-01806 19-cv-01808 19-cv-01815
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Defendants	Counsel	Associated Case(s)
The Random Holdings 401(K) Plan		18-cv-07829
The Stor Capital Consulting LLC 401(K) Plan		18-cv-04434
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		1:19-cv-01781
		1:19-cv-01791
		1:19-cv-01794
David Zelman		1:19-cv-01918
		1:19-cv-01783
		1:19-cv-01798
		1:19-cv-01788
Edwin Miller		1:19-cv-01926
		1:19-cv-01922
		1:19-cv-01928
		1:19-cv-01929
		1:19-cv-01931
Ronald Altbach		1:19-cv-01809
		1:19-cv-01800
		1:19-cv-01803
		1:19-cv-01812
		1:19-cv-01818
Perry Lerner		1:19-cv-01806
		1:19-cv-01870
		1:19-cv-01792
		1:19-cv-01808
		1:19-cv-01815
Robin Jones		1:19-cv-01801
		1:19-cv-01810
		1:19-cv-01813
Ballast Ventures LLC Roth 401(K) Plan		1:19-cv-01781
Bareroot Capital Investments LLC Roth 401(K) Plan		1:19-cv-01783

<b>Defendants</b>	<b>Counsel</b>	<b>Associated Case(s)</b>
Albedo Management LLC Roth 401(K) Plan		1:19-cv-01785
Dicot Technologies LLC Roth 401(K) Plan		1:19-cv-01788
Fairlie Investments LLC Roth 401(K) Plan		1:19-cv-01791
First Ascent Worldwide LLC Roth 401(K) Plan		1:19-cv-01792
Battu Holdings LLC Roth 401(K) Plan		1:19-cv-01794
Cantata Industries LLC Roth 401(K) Plan		1:19-cv-01798
Crucible Ventures LLC Roth 401(K) Plan		1:19-cv-01800
Monomer Industries LLC Roth 401(K) Plan		1:19-cv-01801
Limelight Global Productions LLC Roth 401(K) Plan		1:19-cv-01803
Loggerhead Services LLC Roth 401(K) Plan		1:19-cv-01806
PAB Facilities Global LLC Roth 401(K) Plan		1:19-cv-01808
Plumrose Industries LLC Roth 401(K) Plan		1:19-cv-01809
Pinax Holdings LLC Roth 401(K) Plan		1:19-cv-01810
Roadcraft Technologies LLC Roth 401(K) Plan		1:19-cv-01812
Sternway Logistics LLC Roth 401(K) Plan		1:19-cv-01813

<b>Defendants</b>	<b>Counsel</b>	<b>Associated Case(s)</b>
Trailing Edge Productions LLC Roth 401(K) Plan		1:19-cv-01815
True Wind Investments LLC Roth 401(K) Plan		1:19-cv-01818
Eclouge Industry LLC Roth 401(K) Plan		1:19-cv-01870
Vanderlee Technologies Pension Plan		1:19-cv-01918
Vanderlee Technologies Pension Plan Trust		1:19-cv-01918
Cedar Hill Capital Investments LLC Roth 401(K) Plan		1:19-cv-01922
Green Scale Management LLC Roth 401(K) Plan		1:19-cv-01926
Fulcrum Productions LLC Roth 401(K) Plan		1:19-cv-01928
Keystone Technologies LLC Roth 401(K) Plan		1:19-cv-01929
Tumba Systems LLC Roth 401(K) Plan		1:19-cv-01931
Sander Gerber  Sander Gerber Pension Plan	Stephen D. Andrews Amy B. McKinlay Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005 (202) 434-5000 amckinlay@wc.com sandrews@wc.com	18-cv-4899  18-cv-4899
Michael Ben-Jacob	Thomas E. L. Dewey Dewey Pegno & Kramarsky LLP 777 Third Avenue – 37th Floor New York, New York 10017 Tel.: (212) 943-9000 Fax: (212) 943-4325 E-mail: tdewey@dpklaw.com	1:18-cv-04434 1:18-cv-07824 1:18-cv-07827 1:18-cv-07828 1:18-cv-07829 1:19-cv-01781 1:19-cv-01783



Defendants	Counsel	Associated Case(s)
		1:19-cv-01785 1:19-cv-01788 1:19-cv-01791 1:19-cv-01792 1:19-cv-01794 1:19-cv-01798 1:19-cv-01800 1:19-cv-01801 1:19-cv-01803 1:19-cv-01806 1:19-cv-01808 1:19-cv-01809 1:19-cv-01810 1:19-cv-01812 1:19-cv-01813 1:19-cv-01815 1:19-cv-01818 1:19-cv-01866 1:19-cv-01867 1:19-cv-01868 1:19-cv-01869 1:19-cv-01870 1:19-cv-01871 1:19-cv-01873 1:19-cv-01894 1:19-cv-01896 1:19-cv-01918 1:19-cv-01922 1:19-cv-01926 1:19-cv-01928 1:19-cv-01929 1:19-cv-01931
Acer Investment Group LLC	John C. Blessington K&L GATES LLP State Street Financial Center One Lincoln Street Boston, MA 02111 T: 617.261.3100 F: 617.261.3175 E: john.blessington@klgates.com	18-cv-09841 18-cv-09797 18-cv-09836 18-cv-09837 18-cv-09838 18-cv-09839 18-cv-09840 18-cv-10100 18-cv-05053

<b>Defendants</b>	<b>Counsel</b>	<b>Associated Case(s)</b>
American Investment Group of New York, L.P. Pension Plan		18-cv-09841
DW Construction, Inc. Retirement Plan		18-cv-09797
Kamco Investments Inc. Pension Plan		18-cv-09836
Kamco LP Profit Sharing Pension Plan		18-cv-09837
Linden Associates Defined Benefit Plan		18-cv-09838
Moir Associates LLC 401K Plan		18-cv-09839
Newsong Fellowship Church 401K Plan		18-cv-10100
Riverside Associates Defined Benefit Plan		18-cv-09840
Robert Crema		18-cv-09841
Stacey Kaminer		18-cv-09841 18-cv-09797 18-cv-09836 18-cv-09837 18-cv-09839
Alexander Jamie Mitchell III		18-cv-10100
David Schulman		18-cv-09840
Joan Schulman		18-cv-09838
Darren Wittwer		18-cv-09797
Sheldon Goldstein	Martin H. Kaplan Kari Parks Gusrae Kaplan Nusbaum PLLC 120 Wall Street	18-cv-5053
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